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PART NINE

CONFLICTS OF INTEREST AND DISQUALIFICATION OF BOARD MEMBERS

I. Disqualification

Under RSA 673:14, no member of a planning board, zoning board of adjustment, building code board of appeals, heritage commission or historic district commission shall participate in the hearing or decision of any matter if that member has a direct personal or financial interest in the outcome that differs from the interest of other citizens. *Reasons for disqualification do not include knowledge of the facts involved gained in the performance of the member's official duties* (see below). When there is uncertainty about whether a member should step aside, section II of the statute provides that member who thinks he or she may have a conflict, or any other member, may request a vote on the question, which shall be taken before the public hearing. *However, the vote is advisory and non-binding.* If a member does step aside, the chairman shall designate an alternate member to serve on that application.

The Supreme Court has decided that a member of a land use board who is acting in a quasi-judicial, as opposed to a legislative, capacity must be disqualified if he or she is "not indifferent" to the outcome of the application. *Winslow v. Town of Holderness,* 125 N.H. 714 (1984). Members act in a "quasi-judicial" capacity when they apply the law (including local land use regulations and provisions of State law that may be applicable) to a particular set of facts, and render a decision on a proposed use of land. They act in a legislative capacity, for example, when they debate and decide the content of local land use regulations, or decide what recommendation to make to the voters about that content.

If a member who should step aside from a quasi-judicial decision does not, the decision of the board may well be ruled invalid *even if all the other members vote the same way as the disqualified person,* because the *Winslow* Court ruled that "it was impossible to estimate the influence one member might have on his associates." To protect the integrity of the board's decisions, any member who has some kind of an axe to grind in respect of a particular application should voluntarily step aside, since there is no statutory mechanism to *force* that person to do so. However, it could well be to a litigant's potential advantage if the challenged board member refused to step down in the face of overwhelming opposition from his fellow board members.

There is no single statutory definition of what constitutes a conflict of interest. *Bourne v. Sullivan,* 104 N.H. 348, 351 (1962). As general rule, however, a conflict of interest will be found to exist when a board member has a direct personal and pecuniary interest in the matter before the board that is immediate, definite and capable of demonstration, as opposed to being speculative, uncertain, contingent or remote.

If the member has *some* connection to the matter before the board, but the interest is such that individuals of ordinary capacity and intelligence would not be influenced by it, then there is no impermissible conflict. *Atherton v. Concord,*109 N.H.164 (1968).

A distinction must be made between preconceived points of view and prejudgment of a matter. Preconceived points of view about certain principles of law or a predisposed view about certain public policies (e.g. planning board members favoring or opposing growth control as a general matter) is not necessarily disqualifying. But a prejudgment concerning issues of fact in a particular case certainly disqualifies an individual from sitting in a quasi-judicial capacity in the review of such an application. *New Hampshire Milk Dealers Ass'n v. Milk Control Board,* 107 N.H. 35, 339 (1966). *State v. Laaman,* 114 N.H. 794 (1974).

Guidelines for determining a conflict include the following:

(a) Does the board member expect to gain or lose from his/her position on the matter?

(b) Is the member of a board related to any party?

(c) Has the member of the board assisted or advised either party in this particular matter?

(d) Has the member of the board directly or indirectly given his/her opinion or formed an opinion?

(e) Is the member of the board employed by or does that person employ any party in the case?

(f) Is the member of the board prejudiced to any degree regarding the case?; or

(g) Does the member of the board employ any of the counsel appearing in the case?

These questions, referred to as "juror standards," provide an excellent guideline for determining whether a conflict of interest exists; however, the Supreme Court has recognized that they must be interpreted with a degree of common sense. The key to applying the juror standard is whether an individual is sufficiently indifferent so that he or she can hear the matter in an impartial manner. Even individuals who have formed opinions are not necessarily disqualified if they can set aside their opinions and decide the case on the evidence before them. This is true even where the person is sitting as a juror in a criminal prosecution. *State v. Aubert,* 118 N.H. 739 (1978); *State v. Laaman,* 114 N.H. 794 (1974).

For a more detailed and excellent discussion of the general problem of conflict of interest, see *"STEPPING ASIDE- Public Official Conflicts Of Interest In New Hampshire"* by H. Bernard Waugh, Jr., Esquire, Chief Legal Counsel to the New Hampshire Municipal Association *(Town & City Magazine,* November/December, 1986). The article is reproduced at the end of these materials.

II. Use Of Member's Own Knowledge

A. Generally

It is well settled that members of local land use boards may draw upon their own knowledge of certain factors in making ultimate decisions on proposals that come before them. *Vannah v. Bedford,* 111 N.H. 105 (1971). Not surprisingly, such personal knowledge may support legislative actions of land use boards, as well as when the members act in their "quasi-judicial" capacity to decide particular applications. *Quirk d/b/a Friendly Beaver Campground,* 140 N.H. 124 (1995).

So, for example, board members may rely on their own knowledge of factors such as traffic conditions, surrounding uses, and their opinion of the probable impact of the proposed development on the surrounding neighborhood. *Nestor v. Town of Meredith Zoning Board of Adjustment,* 138 N.H. 632 (1994). Thus, personal knowledge is a valuable tool to help the members sift through the often conflicting testimony of the "dueling experts" who offer absolutely contradictory conclusions about the expected impacts of a development proposal.

B. Limitations

There are, however, limits to the extent that board members may reject evidence in favor of their own personal opinion or "knowledge." In *Condos East Corp. v. Town of Conway,* 132 N.H. 431 (1989) the Conway Planning Board denied a subdivision application for 96 condominium units because the applicant was unable to provide a second road access to the site. The board members were concerned that the Ledgewood Road, the only road giving access to the development, could not safely accommodate the additional traffic. Members were especially concerned about the possibility of having an accident that might block the road during a snowstorm at the same time emergency vehicles needed to get to the development.

To address the board's concerns, the applicant hired an engineer to do a feasibility study to determine the adequacy and safety of the single proposed access. After a thorough review of the matter, the expert recommended certain improvements to the road, including reconstruction of the storm drain system and substantial widening of the road and its shoulders. He concluded that once

these improvements were made, Ledgewood Road could safely carry the increased volume of traffic, and that an accident or stuck vehicle would be unlikely to block the entire 32 foot width of the road so that emergency vehicles would be unable to get through to the development. The developer was willing to pay for the necessary improvements recommended by his expert.

Not surprisingly, the planning board was unwilling to approve the subdivision based only on the findings of the applicant's expert. It was therefore agreed that the board would engage a completely neutral, unbiased academician to conduct a similar study for the board at the applicant's expense. The board chose a professor from the University of New Hampshire, and his report concluded that the addition of the 96 condominium units would not pose an unreasonable risk to the current and future users of Ledgewood Road, and the single access to the development would not create a hazard. This opinion was shared by a third individual from the North Country Council.

In spite of the unanimous opinion of the experts, including the planning board's own expert, the board denied the subdivision, primarily on the grounds that the single proposed access from Ledgewood Road was insufficient and a threat to public safety.

The Superior Court reversed the board's decision, and the Supreme Court agreed with that reversal. The Supreme Court stressed the fact that although board members are free to rely on their own judgment and experience, they are not free to completely ignore uncontradicted expert advice.

Does this case mean that the board must always accept as true expert conclusions that are not contradicted by some other expert? Absolutely not. The *Condos East* case came out the way it did because the Courts found there was just not one shred of evidence to support the denial. The result would have been different if it were clear that the applicant's expert had overlooked some important factors, or had reached conclusions that were plainly not justified on the known facts. The lesson is, yes, be cautious in rejecting expert conclusions, especially where the applicant's expert is the only one. But do not hesitate to apply your personal knowledge of local conditions to test the ultimate conclusions offered by experts. And reject those conclusions if they are not supported by the known facts.